No. 148

IN THE

SUPREME COURT OF THE UNITED STATES.

LESTER G. McKINNIE, NATHAL WINTERS, JOHN R. LEWIS, HARRISON DEAN, FREDERICK LEONARD, ALLEN CASON, JR., JOHN JACKSON, JR., and FREDERICK HARGRAVES,
Petitioners,

v.

STATE OF TENNESSEE,
Respondent.

REPLY BRIEF

For the State of Tennessee.

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State of Tennessee.

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ST. LOUIS LAW PRINTING CO., INC., 415 N. Eighth Street. CEntral 1-4477.

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Petitioners,

v.

STATE OF TENNESSEE,
Respondent.

REPLY BRIEF

For the State of Tennessee.

MAY IT PLEASE THE COURT:

OPINION BELOW.

The petitioners in this cause were convicted for a conspiracy to injure the business of the B & W Cafeteria, Nashville, Tennessee, by blocking the entrance to the restaurant in violation of Section 39-1101, Tennessee Code Annotated, which provides, inter alia, that the crime of conspiracy may be committed by two or more persons conspiring to commit an act injurious to trade or commerce for a violation of Section 62-711, Tennessee Code Annotated, which provides that any person found guilty

of turbulent or riotous conduct about a restaurant and other places of public accommodation may be punished by a fine of not less than $100.00 nor more than $500.00. A violation of Section 39-1101, Tennessee Code Annotated, constitutes a misdemeanor and is punishable by a fine of not more than $1000.00 and confinement in the county jail or workhouse for not more than one year. The punishment for the petitioners in this case was fixed at ninety days in the workhouse and a fine of $50.00.

The conviction was affirmed by the Supreme Court of Tennessee, and is reported as set out in petitioners' brief, ... Tenn., ..., 379 S. W. 2d 214, Petition to Rehear, ... Tenn., ..., 379 S. W. 2d 221.

JURISDICTION.

Counsel for the Respondent, State of Tennessee, admits the jurisdiction of this Honorable Court to review the opinion of the Supreme Court of Tennessee under the writ of certiorari granted October 12, 1964.

QUESTIONS PRESENTED.

Counsel for the petitioners insist in their petition for writ of certiorari that the case requires the determination of six questions of law but in their brief they list seven questions to be determined. Counsel for the Respondent states the substance of these two sets of questions for determination as follows:

(1) Whether or not the Civil Rights Act of 1964 invalidated the State statutes under which the petitioners were convicted (Question 3, Brief and 1 and 2, Petition).

(2) Whether or not the evidence preponderates against the conviction for unlawful conspiracy and in favor of the innocence of the accused (Question 4, Brief and Question 3, Petition).

(3) Whether or not the Supreme Court of Tennessee sustained petitioners' conviction upon a basis not litigated in the trial court (Question 5, Brief and Question 4, Petition).

(4) Whether or not the trial judge's erroneous instruction to the jury that they return a verdict of guilty if they found petitioners violated Section 62-710, Tennessee Code Annotated, which authorizes the owners of restaurants and other places of public accommodation to exclude any person for any reason they desire materially affected the verdict of the jury (Question 5, Brief and Question 5, Petition).

(5) Whether or not the petitioners were tried before a fair and impartial jury in view of the fact that some on voir dire stated that owners of places of public accommodation should be allowed to exclude Negroes if they wished (Question 7, Brief and Question 6, Petition).

STATEMENT OF THE EVIDENCE.

In addition to the statement of the evidence contained in the petition and brief in support thereof, counsel for the Respondent insists that the following statement of evidence also be considered (All page references are to the printed copy of the transcript).

The petitioners appeared at the entrance of the B & W Cafeteria, Sixth Avenue, Nashville, Tennessee, about 12:00 p. m., Sunday, October 21, 1962 (Tr. 88-89) at a time when the entrance was crowded because of people arriving for lunch after being dismissed from church (Tr. 269-270). After being informed by Otis Williams, who was employed by the cafeteria as a doorman that the cafeteria did not serve colored people and that they could not enter, the petitioners insisted, "We are coming in and going to eat when we git in" (Tr. 270-272).

Petitioners were asked to move along and not to make any trouble for the restaurant, but they remained in the vestibule area, approximately 4 feet by 4 feet. The doorman testified that the vestibule was 6 feet by 6 feet four inches (Tr. 270-271). Only a few people managed to squeeze through the vestibule (Tr. 91). The City Policemen were called and they escorted the petitioners away from the entrance (Tr. 92), after they refused to leave otherwise (Tr. 248-249).

One of the State's witnesses described the situation as follows:

> "Well, it was still blocked and people inside couldn't get out. And you could see the crowd outside—wasn't coming in. And it just seemed like an awfully long time till the—under the circumstances—it wasn't too long—while that state of confusion existed. And the police came and then they—it was a question of what to do then. I was talking to some of the policemen, and I was a lawyer, and they thought I knew everything and could solve the situation, and I must admit that I didn't know what to do myself" (Tr. 188).

This same witness testified that after the vestibule of the restaurant was cleared, the crowd inside the restaurant went out and the crowd outside the restaurant entered (Tr. 191-192).

ARGUMENT.

I.

This Honorable Court in **Arthur Hamm, Jr. v. City of Rock Hill,** and **Frank James Lupper et al. v. State of Arkansas,** 33 U. S. L. Week 4079, December 15, 1964, said:

> "We hold that the convictions must be vacated and the prosecutions dismissed. The Civil Rights Act of 1964 forbids discrimination in places of public accommodation and removes peaceful attempts to be served on an equal basis from the category of punishable activities. Although the conduct in the present cases occurred prior to enactment of the Act, the still pending convictions are abated by its passage."

If the attempts made by the petitioners in this case to obtain service in the B & W Cafeteria on equal basis with all other persons can be characterized as peaceful attempts, of course, these convictions must be abated. Counsel for the Respondent insists that the attempts made by the petitioners in this case to obtain service at the restaurant in question were not peaceful attempts. The indictment alleges in effect that the petitioners conspired to block by use of physical force the entrance to the cafeteria in question and prevent patrons inside from leaving and those outside from entering the cafeteria (Tr. 4-5). The trial jury found the protest of the petitioners not to have been made in a peaceful manner. This was also the conclusion of the trial judge and the Supreme Court of Tennesee as evidenced by their approval of the jury verdict.

This Honorable Court in **Feiner v. People of State of New York,** 340 U. S. 315, 71 S. Ct. 303, 95 L. Ed. 295, found very similar conduct not to be peaceful as indi-

cated by the following excerpt taken from 340 U. S. 320, 71 S. Ct. 306, 95 L. Ed. 300:

> "The language of Cantwell v. State of Connecticut, 1940, 310 U. S. 296, 60 S. Ct. 900, 84 L. Ed. 1213, is appropriate here. 'The offense known as breach of the peace embraces a great variety of conduct destroying or menacing public order and tranquility. It includes not only violent acts but acts and words likely to produce violence in others. No one would have the hardihood to suggest that the principle of freedom of speech sanctions incitement to riot or that religious liberty connotes the privilege to exhort others to physical attack upon those belonging to another sect. When clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order, appears, the power of the State to prevent or punish is obvious.' 310 U. S. at page 308, 60 S. Ct. at page 905. The findings of the New York courts as to the condition of the crowd and the refusal of petitioner to obey the police requests, supported as they are by the record of this case, are persuasive that the conviction of petitioner for violation of public peace, order and authority does not exceed the bounds of proper state police action. This Court respects, as it must, the interest of the community in maintaining peace and order on its streets. Schneider v. State of New Jersey, Town of Irvington, 1939, 308 U. S. 147, 160, 60 S. Ct. 146, 150, 84 L. Ed. 155; Kovacs v. Cooper, 1949, 336 U. S. 77, 82, 69 S. Ct. 448, 451, 93 L. Ed. 513. We cannot say that the preservation of that interest here encroaches on the constitutional rights of this petitioner."

It must be remembered, as I know that this Honorable Court will remember, that it is the conduct of the peti-

tioners in question here rather than the conduct of the owner of the cafeteria involved, and the suggestion in argument of counsel for the petitioners to the effect that if the conduct of the restaurant owner was made unlawful, if not before, by the enactment of the Federal Civil Rights Act of 1964, the petitioners' conviction should be reversed or abated without regard to whether or not they sought to obtain rights to which they were entitled by unlawful means or acts contrary to constitutional penal statutes of this State, should be disregarded. It is noted in the majority opinion of **Arthur Hamm, Jr., and Frank James Lupper**, supra, that the legislative history of the Civil Rights Act indicates that the Act would be a defense to criminal trespass, breach of the peace, and similar prosecutions, citing Senator Humphrey in the Congressional Record, May 1, 1964, pages 9162-9163 (U. S. L. Week 4080, December 15, 1964). After noting the legislative history of the Act, it was said that the Act prohibits the application of State laws in a manner that would deprive persons of rights granted under the Act. The case does not hold that it was the intent of the Act for individuals or groups of individuals to take the law in their own hands when rights to which they were entitled were denied. As a matter of fact, one of the significant secondary purposes of the Act was to remove conflicts resulting from the denial of civil rights to people because of race or color from the streets into the courtrooms.

Mr. Justice Black in his dissenting opihion had this to say on the subject:

> "I do not understand from what the Court says that it interprets those provisions of the Civil Rights Act which give a right to be served without discrimination in an establishment which the Act covers as also authorizing persons who are unlawfully refused service a 'right' to take the law into their own hands by sitting down and occupying the premises for as long as they choose to stay. I think one of the chief pur-

poses of the 1964 Civil Rights Act was to take such disputes out of the streets and restaurants and into the courts, which Congress has granted power to provide an adequate and orderly judicial remedy."

U. S. L. Week 4084, December 15, 1964.

Title II, Section 207 (b), Civil Rights Act of 1964, is as follows:

> "The remedies provided in this title shall be the exclusive means of enforcing the rights based on this title, but nothing in this title shall preclude any individual or any State or local agency from asserting any right based on any other Federal or State law not inconsistent with this title, including any statute or ordinance requiring nondiscrimination in public establishments or accommodations, or from pursuing any remedy, civil or criminal, which may be available for the vindication or enforcement of such right."

Thus, it appears that in order for a person to obtain his rights declared by the Civil Rights Act that he is limited in his remedies to those provided for in the Act. It certainly does not make these rights dependent upon a particular individual or a group of individuals' superior physical strength or the superiority of weapons available to him or them as the case may be, and it is submitted that the petitioners would not wish their rights to be dependent upon such factors.

II.

It is insisted by counsel for the petitioners that there is no evidence in the record to support the conviction for conspiracy. This insistence as understood by counsel for the Respondent is predicated upon the theories that (1) petitioners may have been found guilty of seeking service in a "white only" cafeteria or for obstructing the entrance to the cafeteria, the first of which was held to be unconstitutional by the State Supreme Court and it might be

that the jury based their conclusion of guilt upon the former since it cannot be determined from their verdict which of the two acts their findings were bottomed; (2) there was no evidence the petitioners were disorderly, that violence was threatened or occurred; (3) there was no evidence of an agreement among the petitioners to obstruct the entrance to the cafeteria; and (4) the conduct of the petitioners in this case was not constitutionally different from their protesting the denial of their rights by sitting quietly on a lunch stool inside the restaurant.

A conspiracy as defined by the Supreme Court of Tennessee in the case in question and other cases is not materially different from the definition adopted by other jurisdictions. In order to constitute a conspiracy, there must be an agreement between two or more persons to do an unlawful act or a lawful act in an unlawful manner, coupled with an overt act in furtherance of the agreement.

In the case of **American Tobacco Co. v. United States**, 328 U. S. 780, 808, 66 S. Ct. 1125, 1139, 90 L. Ed. 1575, 1594, the following language was used regarding a conspiracy:

> "It is not the form of the combination or the particular means used but the result to be achieved that the statute condemns. It is not of importance whether the means used to accomplish the unlawful objective are in themselves lawful or unlawful. Acts done to give effect to the conspiracy may be in themselves wholly innocent acts. Yet, if they are part of the sum of the acts which are relied upon to effecuate the conspiracy which the statute forbids, they come within its prohibition. No formal agreement is necessary to constitute an unlawful conspiracy. Often crimes are a matter of inference deduced from the acts of the person accused and done in pursuance of a criminal purpose."

Also pertinent is the following excerpt from **Ingram v. United States**, 360 U. S. 672, 679-680, 79 S. Ct. 1314, 1320, 3 L. Ed. 2d 1503, 1509:

> "A conspiracy, to be sure, may have multiple objectives, United States v. Rabinowich, 238 U. S. 78, 86, 35 S. Ct. 682, 684, 59 L. Ed. 1211, and if one of its objectives, even a minor one, be the evasion of federal taxes the offense is made out, though the primary objective may be concealment of another crime."

The foregoing excerpts considered with the circumstances recited above in this case appear to be an adequate reply to the first and third contentions made that a conspiracy was not proven. The second contention to the effect that there was no evidence of violence, disorder, etc., was answered in the reply to the first assignment of error.

The fourth contention to the effect that the conduct of the petitioners in this case is identical in principle to their sitting quietly on a lunch stool inside the restaurant for the purpose of protesting a denial of their rights raises perhaps the ultimate issue in this case. The State submits there is a big difference between the two types of acts. For these eight petitioners to sit quietly in the restaurant and refuse to remove themselves therefrom after being informed they would not be served, would not materially obstruct the management's effort to carry on the business, whereas their blocking the entrance to the building to the extent it was blocked tended to paralyze the operation of the restaurant except for a few customers who were willing to push their way through the petitioners' blockade As stated above, the petitioners' conduct was not peaceful.

The inference to be drawn from the case of **Garner v. State of Louisiana**, 368 U. S. 157, 82 S. Ct. 248, 7 L. Ed.

2d 207, is, that if the petitioners in that case had been disturbing the peace, their conduct would have been unlawful. Peaceful protesting in a case of this type is very analogous to peaceful picketing. Peaceful picketing has been defined in **Goldfinger v. Feintuch**, 11 N. E. 2d 910, annotated 116 A. L. R. 477, and **Senn v. Tile Layers Union**, 301 U. S. 468, 57 S. Ct. 857, 81 L. Ed. 1229. It does not include any form of physical obstruction or interference with business.

III.

The indictment recited that the B & W Cafeteria was operating a restaurant not open to Negroes by authority of Section 62-710, Tennessee Code Annotated. When the case was decided by the Tennessee Supreme Court, it was found unnecessary to determine the validity of this section of the Code and assumed for the purpose of the appeal that it was unconstitutional. Now it is insisted that this amounts to affirming the conviction on a basis not litigated in the trial court. Counsel for the Respondent, State of Tennessee, insists that the Tennessee Supreme Court only found it unnecessary to determine the validity of Section 62-710, Tennessee Code Annotated. This is a practice that is almost universal. In **Garner v. State of Louisiana**, supra, it was found by this Honorable Court that there was no necessity for determining the constitutionality of the Louisiana statute involved because the facts did not bring the case within the purview of the statute.

The recitation in the indictment relative to the policy of the cafeteria, while perhaps not necessary in the indictment, did serve to help show that the petitioners knew they would not be admitted into the cafeteria when they arrived, and is another circumstance tending to show their prior agreement either formal or tacit to commit the conspiracy.

At any rate, the Tennessee Supreme Court found that the conduct of the petitioners under the circumstances was unlawful without regard to whether or not the policy of the cafeteria could legally be supported. On this subject, the Tennessee Supreme Court said in its opinion (Tr. 324), comparing the circumstances with those in the cases of **Peterson v. City of Greeneville**, 373 U. S. 244, 83 S. Ct. 1119, 10 L. Ed. 2d 323; and **Lombard v. State of Louisiana**, 373 U. S. 267, 83 S. Ct. 1122, 10 L. Ed. 2d 339:

> "These two cases are distinguishable from the instant case. The trespass complained of in the Peterson and Lombard cases was the act of sitting on a stool at a lunch counter. This is basically an innocent and unoffensive act. It was only unlawful, in the eyes of the city and state concerned, because of a city ordinance in the Peterson case and an executive directive in the Lombard case, both of which required segregation of the races in public facilities. But absent the governmental mandate and the color of the defendants' skin in those two cases, and the act is basically unoffensive and innocent. This is not so in the instant case. **Stripped of any question of race and discrimination, the act complained of is still unlawful.** In the instant case, if these eight defendants had been white boys, their acts would still have been unlawful. We cannot escape from the fact that these eight defendants were blocking the entrance to the doorway of the B & W Cafeteria. Regardless of who they were and why they were blocking the doorway, their conduct is still basically unlawful" (Tr. 324).

Because of the foregoing, it is insisted that the Supreme Court of Tennessee did not consider a matter not litigated at the trial level but even if such had been the case, there are many instances where cases are decided by appellate courts on issues not discussed or determined at

the trial level. **Elizabethton v. Carter County**, 204 Tenn. 452, 321 S. W. 2d 822; and **Frazier v. Elmore**, 180 Tenn. 232, 173 S. W. 2d 563. See also **Hormel v. Guy T. Helvering**, 312 U. S. 551, 61 S. Ct. 719, 85 L. Ed. 1037, to the effect that the rule should not be applied where an injustice might be caused.

IV.

The trial judge, after reading the indictment to the jury setting out that the petitioners were charged with a conspiracy to commit acts injurious to the trade of the B & W Cafeteria in violation of Sections 39-1101 and 62-711, Tennessee Code Annotated, made reference to a violation of Section 62-710, Tennessee Code Annotated, along with the first two mentioned in the indictment even though the latter was a civil statute relative to the conduct of the business by the owner and a section of the Code which could not have been violated by the petitioners.

The Supreme Court of Tennessee in its opinion said:

> "A careful reading of the indictment and the whole charge shows that the only purpose in referring to this statute was to indicate that this restaurant was being operated for white people only by authority of this section. There were no questions raised following the charge about the propriety of reading it and we do not see how the reference to a civil statute such as this, although error, could affect the jury's verdict, since there was ample evidence to convict the defendants of the offense defined in the other sections of the code charged" Tr. 321.

The trial judge on each of the three occasions in his charge when he referred to the civil section of the Code (Section 62-710, Tennessee Code Annotated), in conjunction with the two criminal sections of the Code indicated that the three sections prohibited acts injurious to the business of the restaurant. The error was, therefore, in

the nature of a typographical or clerical error as obvious to the jury as to counsel for the petitioners. The only thing confusing about the instruction was the use of the number of the Code section, Section 62-710, along with the number of the two sections of the Code defining the offense, a circumstance overcome by the accompanying statement of the essential elements of the offense in each instance.

No objection was made by counsel for the petitioners to this part of the instruction. Because of the nature of the error as revealed by the circumstances cited above, counsel for the Respondent insists that the following rule laid down by this Honorable Court in **Palmer v. Hoffman**, 318 U. S. 109, 119-120, 63 S. Ct. 477, 483, 87 L. Ed. 645, 653, is applicable:

> "Under these facts a general exception is not sufficient. In fairness to the trial court and to the parties, objections to a charge must be sufficiently specific to bring into focus the precise nature of the alleged error. Where a party might have obtained the correct charge by specifically calling the attention of the trial court to the error and where part of the charge was correct, he may not through a general exception obtain a new trial. See Lincoln v. Claflin, 7 Wall. (U. S.) 132, 139, 19 L. ed. 106, 109; Beaver v. Taylor, 93 U. S. 46, 54, 55, 23 L. ed 797, 798; Mobile & M. R. Co. v. Jurey, 111 U. S. 584, 596, 28 L. ed. 527, 431, 202 U. S. 600, 611, 50 L. ed. 1162, 1168, 26 S. Ct. 709; Norfolk & W. R. Co. v. Earnest, 229 U. S. 114, 122, 57 L. ed. 1096, 1101, 33 S. Ct. 654, Ann. Cas. 1914C 172; Pennsylvania R. Co. v. Minds, 250 U. S. 368, 375, 63 L. ed. 1039, 1041, 30 S. Ct. 531."

V.

Complaint is made that the petitioners were tried before a jury of white persons who "admitted a firm and life-

long practice, custom, philosophy, and belief in racial segregation" which rendered them disqualified to sit on the case. The record shows that those who were accepted stated that they could disregard their attitude on social questions and perform their duties as jurors on the basis of the evidence and the law (Tr. 32-39, 44-46, 67-68, 74-80, and 81-86).

The first reply to this insistence is that the matter of whether or not the owner of the B & W Cafeteria could constitutionally keep it segregated was not an issue before the jury. It was not made that by the indictment nor the instruction of the trial judge. It was alleged in the indictment as previously stated in this brief to help show the existence of the conspiracy. So, it was never shown that the jurors had formed an opinion on the issue to be tried and consequently, there is no factual basis for this contention.

But on the other hand since the jurors testified they could determine the guilt or innocence of the petitioners fairly on the law and the evidence rather than preconceived opinions, they were qualified. **Kennedy v. State of Tennessee,** 186 Tenn. 310, 210 S. W. 2d 132. See also the following excerpt from **Green et al. v. United States,** 19 F. 2d 850, 855:

> "Error is assigned to the denial of the defendants' challenge of certain of the jurors for actual bias. While it was shown that they had heard about the case, and some of them had formed an opinion as to the guilt or innocence of the defendants, all admitted in substance that it was not a fixed opinion, that it could be disregarded, and that they would endeavor to render a verdict according to the evidence, under the instructions of the court. We think there was no error. Section 331, Washington Compiled Statutes (Remington), provides: 'Although it should appear

that the juror challenged has formed or expressed an opinion upon what he may have heard or read, such opinion shall not of itself be sufficient to sustain the challenge, but the court must be satisfied, from all the circumstances, that the juror cannot disregard such opinion and try the issue impartially.' We are not convinced that there was abuse of discretion in denying the challenge. Spies v. Illinois, 123 U. S. 131, 8 S. Ct. 22, 31 L. Ed 80."

The rule of **Thiel v. Southern Pac. Co.**, 328 U. S. 217, 66 S. Ct. 984, 90 L. Ed. 481, and two other cases cited by counsel for the petitioners to the effect that in both criminal and civil proceedings litigants are entitled to an impartial jury drawn from a cross-section of the community, is not shown to be violated in this case. It is not even insisted that all the members of the jury expressed an opinion that restaurant owners had a right to exclude any person, including Negroes, from their place of business. It is not shown that they were prejudicial at all. The most that is shown is that these jurors were mistaken about the law, or what the law ought to be, which is not unusual among people generally or even among lawyers.

In view of the foregoing, counsel for the Respondent, State of Tennessee, earnestly insists that the judgment of the Supreme Court, State of Tennessee, in this case be affirmed.

Respectfully submitted,

GEORGE F. McCANLESS,
Attorney General,
State of Tennessee,

By THOMAS E. FOX,
Assistant Attorney General,
State of Tennessee.

I certify that I forwarded a copy of this Reply Brief for the State of Tennessee to the Honorable Jack Greenberg and the Honorable James M. Nabrit, III, Attorneys at Law, 10 Columbus Circle, New York, New York 10019, and to the Honorable Avon N. Williams and the Honorable Z. Alexander Looby, Attorneys at Law, McClellan-Looby Building, Charlotte at Fourth, Nashville, Tennessee, on this the .... day of ....., 1965.

Thomas E. Fox,
Assistant Attorney General,
State of Tennessee.